Filed 5/18/09 P. v. Robinson CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. KENNY ROBINSON, Defendant and Appellant.	B208026 (Los Angeles County Super. Ct. No. SA054630)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert P. O'Neill, Judge. Affirmed.

H. Russell Halpern, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Keith H. Borjon and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Kenny Robinson appeals convictions for attempted robbery, murder, robbery and attempted carjacking. Appellant claims he suffered from ineffective assistance of trial counsel for failure to: (1) object to the admission of appellant's statements to Detective Loman on Sixth Amendment grounds; (2) request severance of multiple joined counts; and (3) object to prosecutorial misconduct. Appellant's claims lack merit. As we shall explain, had counsel made these objections, the court would not have abused its discretion in denying each of them. Appellant did not have a Sixth Amendment right at the time of questioning by Detective Loman; multiple charges against him were properly joined; and there is no evidence of prosecutorial misconduct. As no prejudice resulted from the lack of objections on these grounds, appellant's trial counsel was not ineffective. Accordingly, we affirm.

FACTUAL AND PROCEDURAL HISTORY

On November 30, 2004, appellant was arrested with a ski mask in his pocket and a 9-millimeter semi-automatic handgun he had recently discarded in the bushes nearby. Arresting officers were responding to reports of an attempted robbery at a neighborhood Pizza Hut by a man with a semi-automatic handgun and a ski mask.

After his arrest, appellant was questioned by several Los Angeles Police Detectives. In his interview with Detective Dennis Bopp at 4:00 a.m. on December 1, 2004, appellant waived his *Miranda*[1] rights and personally wrote a statement acknowledging his involvement in the attempted robbery at the Pizza Hut. His account made note of the participation of two other men in the attempted robbery, as well as a statement that he had been carrying a weapon and had discarded that weapon moments before his arrest ("Pizza Hut Robbery").

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct.1602].

Subsequently, on December 1, 2004, appellant was interviewed by Detective Blanca Lopez. During this interview appellant told Detective Lopez that his role in the Pizza Hut robbery was as a lookout. Appellant also identified photographs of the two other participants in the attempted robbery.

Early on December 1, 2004, Manual Munoz, a criminologist with the Los Angeles Sheriff's Department, determined the gun police found when they arrested appellant (and that they believed appellant had tossed into the bushes shortly before the stopped him) was the same weapon used in the murder, robbery and attempted carjacking of Chris Adams ten days earlier, on November 20, 2004, in the City of Hawthorne ("Adams Murder").

On the same day after the interview by Detective Lopez, appellant was interviewed by Detective Mitchell Loman. Appellant was advised of his Fifth Amendment *Miranda* rights prior to the interview. Appellant admitted in this interview that he had been present for the Adams murder, though described his role as that of a lookout. Detective Loman asked the appellant how he "wound up with" the gun, and appellant explained that while he had the gun in his possession shortly after the murder, he gave it to another man.

The first charges against appellant were filed on December 30, 2004; he was charged with two counts of second degree attempted robbery under Penal Code sections 664/211, in connection with the Pizza Hut Robbery. On January 29, 2007, the prosecutor submitted a motion to consolidate the Pizza Hut Robbery charges with two additional charges stemming from the Adams Murder—robbery and murder under Penal Code sections 211 and 187, subdivision (a), respectively. The court granted the motion.

On March 27, 2007, in an amended information, appellant was charged with: attempted robbery (Pen. Code, §§ 664/211) in counts 1 and 2; murder (Pen. Code, § 187, subd. (a)) in count 3; robbery (Pen. Code, § 211) in count 4; and attempted carjacking (Pen. Code, § 664.215, subd. (a)) in count 5. Counts 1 and 2 further alleged that appellant personally used a handgun within the meaning of Penal Code section 12022.53, subdivision (b). Count 3 alleged as special circumstance that appellant committed the

murder during a robbery and attempted carjacking. Counts 3, 4, and 5 further alleged that appellant committed the offense for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)(A)), and that he personally discharged a firearm causing great bodily injury (Pen. Code, § 12022.53, subds. (b)-(d)).

Trial began on August 27, 2007, and appellant was found guilty of all charges.

Appellant filed a timely appeal.

DISCUSSION

Appellant claims his trial counsel provided ineffective assistance in failing to: (1) object to the admission of appellant's statements to Detective Loman on Sixth Amendment grounds; (2) request severance of multiple joined counts; and (3) object to prosecutorial misconduct.

To establish a claim of ineffective assistance of counsel, the defendant must demonstrate that his counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-687; *People v. Williams* (1997) 16 Cal.4th 153, 215.) The burden of proving an ineffective assistance of counsel claim falls on the defendant. (*People v. Ledesma* (1987) 43 Cal.3d 171, 218.) A reviewing court need not determine "whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies…. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*In re Fields* (1990) 51 Cal.3d 1063, 1079.) Appellant must affirmatively demonstrate prejudice. It is not sufficient for the defendant to show the error had some "conceivable effect" on the outcome of the proceeding; defendant must prove that there is a "reasonable probability" that absent error the result would have been different. (*People v. Ledesma*, *supra*, 43 Cal.3d at pp. 217-218.)

1. Appellant's Counsel Was Not Ineffective in Failing to Object to Statements Made to Detective Loman on Sixth Amendment Grounds.

Appellant claims that counsel was ineffective for failing to object to the introduction of his statements during his December 1, 2004, interview by Detective Loman regarding the Pizza Hut Robbery, on Sixth Amendment grounds, when Detective Loman asked appellant, "[a]nd how'd you wind up with the gun?" Appellant fails, however, to show that at the time of questioning he had already been charged with the Pizza Hut Robbery—the threshold requirement for Sixth Amendment rights to attach. (*Kirby v. Illinois* (1972) 406 U.S. 682, 687.)

> "A criminal defendant's right to the assistance of counsel under the Sixth Amendment does not exist until the State initiates adversary judicial criminal proceedings, such as by formal charge or indictment…. Moreover, the Sixth Amendment right to counsel is 'offense specific'; it arises and may be asserted only as to those offenses for which criminal proceedings have formally begun." (*People v. DePriest* (2007) 42 Cal.4th 1, 33.)

Detective Loman's interview of appellant occurred within one day of appellant's arrest for the Pizza Hut Robbery and before he was formally charged for these crimes. The first hearing for appellant following his arrest was a preliminary hearing on December 16, 2004—more than two weeks after Detective Loman's questioning of the appellant on December 1, 2004. The first arraignment hearing on these charges was initially scheduled for December 30, 2004—a full month after Detective Loman questioned the appellant. At the time of the initial questioning by Detective Loman, appellant was not yet charged with the Pizza Hut Robbery, and his Sixth Amendment rights had not yet attached.

Even if he had already been charged with the Pizza Hut Robbery at the time of questioning, the Sixth Amendment did not prevent appellant from being asked questions about his possession of the weapon used in the Adams Murder. Appellant acknowledges that at the time he was questioned by Detective Loman, no charges had been filed against him relating to the death of Adams. Detective Loman, therefore, was not bound by the Sixth Amendment in questioning appellant about the weapon used in the homicide. (*Kirby v. Illinois*, *supra*, 406 U.S. at p. 687.)[2]

Further, if appellant had a Sixth Amendment right to counsel at the time he was questioned by Detective Loman, at no time did he attempt to invoke a right to counsel. Conversely, he acknowledged his rights as advised by Detective Loman and spoke anyway—if he had a Sixth Amendment right to counsel, he waived that right.

> "Petitioner, however, at no time sought to exercise his right to have counsel present. The fact that petitioner's Sixth Amendment right came into existence with his indictment, i.e., that he had such a right at the time of his questioning, does not distinguish him from the preindictment interrogatee whose right to counsel is in existence and available for his exercise while he is questioned. Had petitioner indicated he wanted the assistance of counsel, the authorities' interview with him would have stopped, and further questioning would have been forbidden (unless petitioner called for such a meeting)." (*Patterson v. Illinois*, (1988) 487 U.S. 285, 290-291; citing *Michigan v. Jackson*, (1986) 475 U.S. 625, 633-35.)

In sum, because appellant would not have had a viable complaint under the Sixth Amendment concerning his statement to Detective Loman, appellant's counsel was not ineffective.

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[2] Appellant does not make a Fifth Amendment "Miranda" claim here. However, any such claim would have been without merit because he was advised of his rights prior to questioning by Detective Loman.

2. Appellant's Counsel Was Not Ineffective in Failing to Move to Sever the Counts Involving the Murder Charge from the Charges Involving the Attempted Robbery.

Appellant was charged with attempted robbery in connection with the Pizza Hut robbery and from the Adams Murder he was charged with murder, robbery and attempted carjacking. Before this court, appellant claims that counsel was ineffective for failing to object to consolidation of the charges or for failing to move to sever. As we shall explain, his claim is without merit.

"The law prefers consolidation of charges." (*People v. Ochoa* (1998) 19 Cal.4th 353, 409.) Pursuant to Penal Code section 954: "An accusatory pleading may charge two or more different offenses connected together in their commission, or… two or more different offenses of the same class of crimes or offenses, under separate counts, … provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately."

Here, the crimes of murder and attempted robbery are of the same class—"assaultive crimes against the person." (*People v. Lucky* (1988) 45 Cal.3d 259, 276; see *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1243 [robbery and murder are the same class of crime].) When the threshold statutory requirements for consolidation are met, the appellant can show error in denying a motion to sever only upon a clear showing of potential prejudice. (Pen. Code, § 954; *People v. Stanley* (2006) 39 Cal.4th 913, 934.) A trial court's decision to deny severance is reviewed for abuse of discretion. (*Ibid.*)

"The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial. [Citation.] Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the appellant; (3) a 'weak' case has been joined with a

'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. [Citations.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315.)

Appellant bases his argument for prejudice primarily on the absence of cross-admissibility of evidence on the Pizza Hut Robbery and the Adams Murder. Appellant argues that because statements made to Detective Loman regarding his possession of the gun should have been excluded on Sixth Amendment grounds, without these statements there would not be admissible evidence that appellant possessed and personally used the weapon during the Pizza Hut Robbery. However, as explained above, there was no basis to exclude these statements under the Sixth Amendment.

Nonetheless, even if the statements made to Detective Loman were excluded from evidence, sufficient cross-admissible evidence existed to properly join appellant's charges—specifically, the fact that ballistic evidence showed that the gun the police believed appellant possessed shortly before his arrest was used in the other crime. Whether appellant took possession of the gun prior to, during, or after the attempted robbery does not change the admissibility of the gun evidence in both the Pizza Hut attempted robbery charges and the charges surrounding the earlier murder.

In any event, cross-admissibility is not the *sine qua non* of joint trials. (*People v. Mason* (1991) 52 Cal.3d 909, 934; *Frank v. Superior Court* (1989) 48 Cal.3d 632, 641.) "While we have held that cross-admissibility ordinarily dispels any inference of prejudice, we have never held that the absence of cross-admissibility, by itself, sufficed to demonstrate prejudice." (*People v. Mason*, *supra*, 52 Cal.3d at p. 934.)

"The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." (*People v. Bean* (1988) 46 Cal.3d 919, 938.) Appellant did not carry that burden. Although appellant does not address the remaining three criteria, joinder was nonetheless proper.

The joinder of the Pizza Hut Robbery and the Adams Murder was not likely to inflame the jury against the appellant. The charges joined in appellant's trial were attempted robbery—including the use of a handgun—together with murder, robbery and attempted carjacking. The charges and the evidence supporting them were equally inflammatory. (See *People v. Balderas* (1985) 41 Cal.3d 144, 170, 174.) Evidence of gang membership, and gang violence against non-gang members, does have the potential to inflame the jury. (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 452.) Evidence of gang involvement, however, would have been relevant and admissible as to each charge if severance had been granted, rendering equal the potential of both charges to inflame the jury.

In regards to joining a "weak" case with a "strong" case, causing a "spillover" effect to alter the outcome, the evidence of appellant's involvement and culpability in each charge was similar. There were no eyewitnesses who specifically identified appellant at the scene of either the murder or the attempted robbery, both cases relied on appellant's statements to police in which he admitted to being at the scene of each. Both cases also relied on appellant's possession of the gun. Moreover, evidence was also used to show that appellant's gang was involved in both the murder and the attempted robbery. As such, there was no substantial disparity in the strength of evidence between the two cases that would make one comparatively "weaker" or "stronger" than the other, indicating that a "spillover" might have occurred.

Finally, neither one of the charges carried the death penalty as a possible sentence, nor did capital charges result from the joinder of the two incidents.

As the evidence relating to both the Pizza Hut Robbery charge and the Adams Murder was cross-admissible, equally inflammatory and both cases were of equal strength, appellant has not demonstrated the court might have sustained an objection to joining the charges, and thus appellant's counsel was not ineffective in failing to object on that basis.

3. Appellant's Counsel Was Not Ineffective in Failing to Object to Perceived Prosecutorial Misconduct.

Appellant claims the prosecutor engaged in misconduct when he characterized appellant's statements to police regarding the Pizza Hut Robbery as evidence of a pattern of falsely minimizing his conduct, implying his statements to officers regarding the murder should not be believed. In our view, appellant's counsel was not ineffective in failing to object to them.

A prosecutor has wide latitude during argument to urge whatever conclusions counsel believes can properly be drawn from the evidence. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions from the evidence. (*People v. Ward* (2005) 36 Cal.4th 186, 215.) A prosecutor can make observations "'regarding the apparent honesty or reliability of'" a witness "based on the 'facts of [the] record and the inferences reasonably drawn therefrom.'" (*People v. Turner* (2004) 34 Cal.4th 406, 432-433; citations omitted.)

Under Evidence Code section 1101, subdivision (a), evidence of a person's character, including specific instances of conduct, is inadmissible when offered to prove his or her conduct on a specific occasion. However, in our view the prosecutor's statements in his closing remarks—that appellant does "the same thing… put all the blame on his accomplices" —when read in context, were not improper. The prosecutor's references were not offered to prove appellant's specific conduct on either occasion at issue or an overt effort to use evidence concerning one incident as guilt of the other. The prosecutor's observation that with both incidents appellant sought to minimize his acts and implicate others is a fair and reasonable observation about the evidence. The statement reflects only what appellant actually admitted to the police—that he had minimal involvement in each incident. The prosecutor's reference to this pattern of behavior does not run afoul of Evidence Code section 1101, subdivision (a), and in fact is permitted under Evidence Code section 1101, subdivision (b). (See Evid. Code § 1101

(b) ["Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . ."].) Moreover, the prosecutor's remark is also a fair comment on the credibility of appellant's statements to the police. (See Evid. Code, §§ 780 and 1101, subd. (c).)

Likewise, in view of CALJIC No. 17.02[3] given to the jury, we do not believe that the prosecutor's comments would have caused the jury to fail to assess the evidence on each of the charges separately. Furthermore, CALJIC No. 1.02 directed that "statements made by the attorneys during the trial are not evidence." We presume that the jury understood and applied these instructions. (*People v. Jablonski* (2006) 37 Cal.4th 774, 806-807.)

Finally, the prosecutor's comment was brief and made in passing. Appellant has not demonstrated that the prosecutor's statements persuaded the jury in a deceptive or reprehensible manner. Nor has appellant demonstrated that trial counsel's failure to object did not "so undermine the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 686.)

DISPOSITION

The judgment is affirmed.

WOODS, J.

We concur:

PERLUSS, P.J. **ZELON, J.**

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[3] CALJIC No. 17.02 instructs the jury to decide each count separately.